STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 7, 2007
v	No. 268124 Macomb Circuit Court
CORNELIUS HANNIBAL DUNSON, Defendant-Appellant.	LC No. 2005-002448-FC

Before: White, P.J., and Zahra and Fort Hood, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of armed robbery, MCL 750.529, one count of conspiracy to commit armed robbery, MCL 750.529(c), and unlawfully driving away an automobile, MCL 750.413. He was sentenced to 15 months to 20 years' imprisonment for each armed robbery conviction, and for the conspiracy conviction, and to 23 to 60 months' imprisonment for unlawfully driving away an automobile. He appeals as of right. We affirm.

This case arises out of the defendant's involvement in the armed robbery of Mr. Mack's Bar and Grill in Eastpoint on May 10, 2005. Defendant was arrested based on a police officer's positive identification of defendant from a photographic lineup. The identifying officer pursued the vehicle that was stolen from the bar's owner and engaged in a foot pursuit of the driver of the stolen vehicle after the driver abandoned the stolen vehicle. According to the officer, defendant was the driver. Defendant's accomplice, D'Angelo Camp, was apprehended after a high-speed police chase involving a vehicle that had been following the stolen vehicle. Police recovered a cellular telephone from Camp's vehicle, and found that Camp called defendant's cellular telephone moments after the robbery. The juror's were instructed that they could convict defendant of armed robbery as a principle or under an aiding and abetting theory.

Defendant first argues that the trial court erred by failing to adequately instruct the jury that one who aides and abets must have the requisite specific intent to commit the crime. We disagree.

This issue is not preserved. At trial, defense counsel indicated satisfaction with the proposed jury instructions before they were read for the jury. After the jury was sent out to deliberate, defense counsel reaffirmed that he had no objection. Nevertheless, we note that, when considered in their entirety, the jury instructions fairly and adequately presented the law to

the jury. The trial court read CJI2d 8.1, the standard aiding and abetting instruction, immediately after the armed robbery instruction. This Court has repeatedly upheld the validity of the standard definition of aiding and abetting contained in CJI2d 8.1. See *People v Partridge*, 211 Mich App 239, 240; 535 NW2d 251 (1995); *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995); *People v Lawton*, 196 Mich App 341, 351-352; 492 NW2d 810 (1992). There was no error.

Defendant next argues that offense variables (OV) 1, MCL 777.31, and 2, MCL 777.32, were improperly scored. A sentencing court has discretion when determining the number of points to be scored for offense variables, provided that evidence of record adequately supports each particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). This Court must uphold the sentencing court's scoring decision where there is "any evidence" to support that score. *Id.* As a preliminary matter, we note that defendant's assertion that OV 2 was misscored is without merit because his corrected Sentencing Information Report (SIR) indicates that OV 2 was scored at zero points.

OV 1 was properly scored at fifteen points. MCL 777.31(l)(c) provides that fifteen points should be scored where "[a] firearm was pointed at or toward a victim." Defendant asserts that the evidence adduced at trial does not support a score of fifteen because the gun recovered from the codefendant's car was a BB gun. Although the firearm recovered was not entered into evidence, several police witnesses described the gun as if it were an actual firearm. Regardless, this Court has found that OV 1 may be scored based on a defendant's use of an implied firearm. *People v Elliott*, 215 Mich App 259, 261; 544 NW2d 748 (1996). Consequently, there was no plain error affecting defendant's substantial rights related to the scoring of OV 1. Further, because the score of fifteen points is supported by the evidence, defendant's argument based on the statutory provision barring a score of five points where the conviction offense is armed robbery is inapposite.

We note that the there is a discrepancy between the corrected SIR in the record and the trial court's statement at the time of sentencing regarding the defendant's total offense variable score. Nevertheless, whether the defendant's total OV score was fifty, and indicated by the trial court, or forty-five, as indicated by the corrected SIR, his minimum sentence range under the legislative sentencing guidelines for the Class A offense of armed robbery is 81 to 135 months pursuant to MCL 777.62. Defendant's minimum sentence of 135 months was within the applicable guideline range and resentencing is not required.

Finally, defendant's argument on appeal that the scoring of OV 1 enhanced his sentence based on facts not proved at trial and, therefore, violated his Sixth Amendment right to a jury trial under *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), and *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), is without merit. Michigan's sentencing scheme does not offend the Sixth Amendment on the basis that its sentences are based on facts not determined by a jury beyond a reasonable doubt. *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006). If defendant receives a sentence within the statutory maximum, a trial court may utilize judicially ascertained facts to fashion a sentence within the range authorized by the jury's verdict. *Id.* at 164. Consequently, the trial court's scoring of the challenged offense variables did not violate defendant's constitutional rights.

Lastly, defendant seeks either a new trial on the basis that, or remand for an evidentiary hearing to establish that, he was denied the effective assistance of counsel by defense counsel's failure to call Camp as a witness. To establish ineffective assistance of counsel, defendant must show (1) that his trial counsel's performance fell below an objective standard of reasonableness, and (2) that defendant was so prejudiced by his trial counsel's errors that he was denied a fair trial, i.e., that a reasonable probability exists that, but for counsel's errors, the result of the proceedings would have been different. *People v Moorer*, 262 Mich App 64, 75-76; 683 NW2d 736 (2004). Effective assistance of counsel is presumed, and defendant bears a heavy burden of proving otherwise. *Id*. at 76. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy," and this Court "will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

To support his claim of ineffective assistance, defendant provides an affidavit in which Camp attests that if he had been called as a witness at trial, he would have testified that defendant was not involved in the robbery. However, abundant evidence was presented at trial that defendant was Camp's accomplice: Camp referred to his accomplice by defendant's first name; the handgun found was registered to defendant; cellular telephone records linked defendant to Camp at the time of the incident; defendant was identified as the driver of the stolen vehicle; and defendant was identified by the bar owner as one of the two men who robbed her.

It is presumed that defense counsel made a strategic decision not to present Camp as an exculpatory witness. *Rockey*, *supra* at 76. Indeed, the credibility of Camp's testimony disavowing defendant's involvement in the robbery was inherently suspect in light of his friendship with defendant. Moreover, the weight the jury would afford Camp's testimony was dubious, given the overwhelming evidence of defendant's participation in the robbery, as well as the fact that Camp had already assumed responsibility for his own involvement in the crime. Further, even if defendant could establish that defense counsel erred in failing to call Camp as a witness, he cannot demonstrate a reasonable probability that, but for the error, the outcome of the trial would have been different. *Moorer*, *supra* at 75-76. Reversal is not required.

Affirmed.

/s/ Helene N. White
/s/ Brian K. Zahra
/s/ Karen M. Fort Hood